91-331

CASE NUMBER _____

IN THE UNITED STATES SUPREME COURT
OCTOBER TERM, 1991

FASIH Q. ZAMAN, M.D.,

Petitioner,

v.

SOUTH CAROLINA STATE BOARD OF
MEDICAL EXAMINERS,

Respondent.

PETITION FOR WRIT OF CERTIORARI
to the Supreme Court of South Carolina

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the U.S. Constitution, Amendment Fourteen (the Due Process Clause), require - prior to the only available factual hearing on the matter involved - more notice to professional persons charged with activities which can lead to loss of licensure than merely that specific factual activity violates the "norms" of professional conduct, with those "norms" only to be established post hoc by testimony in each separate instance at the hearing in each case, or does such a procedure deny the professional involved adequate notice and opportunity to prepare and be heard?

2. In this instance, was the Petitioner, Dr. Fasih Q. Zaman, denied due process of law by virtue of being denied an opportunity to be heard and cross-exam-

ine witnesses due to his inability due to illness to appear in Columbia, South Carolina at the only evidentiary hearing provided, he being at that time prevented from traveling from the Nation of Pakistan by doctor's orders?

3. Is it a denial of due process of law for an individual to be deprived of his license to practice medicine on the basis of an anonymous accusation, and for him further to be denied an ajudication of that issue by the State Supreme Court on the basis of an assertion by that Court that the issue had not been raised at the outset when it is clearly in the record that the individual requested the identity of the accuser in his initial Answer in the administrative proceedings and further requested it on the basis of claim of possible prejudice (based on historical

fact) in the course of the administrative proceedings?

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INTRODUCTORY PRAYER

Dr. Fasih Q. Zaman prays that a writ of Certiorari be granted to review the decision and judgment of the Supreme Court of South Carolina entered in Zaman v. South Carolina State Board of Medical Examiners, entered on April 8, 1991.

OPINIONS BELOW

The opinion of the South Carolina Supreme Court in this case is printed in the Appendix hereto at p. 1; it has not yet been reported, and may be found at Zaman v. S.C. State Board of Medical Examiners, 1991 WL 53638. The opinion of the Circuit Court for the Fifth Judicial Circuit of the State of South Carolina is unreported and is set forth at Appendix, p. 10. The opinion (Final Order) of the South Carolina Board of Medical Examiners is unreported and is set forth at Appen-

dix, p. 24. All parties are listed in the caption, and there are no other interests.

JURISDICTION

The Opinion of the Supreme Court of South Carolina was entered on 8 April 1991; on 2 July 1991 after application by Petitioner Chief Justice William H. Rehnquist entered an Order extending the time for filing a petition for a writ of Certiorari in this case "to and including August 6th, 1991." This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fourteenth Article of Amendment to the United States Constitution, specifically the Due Process Clause thereof, and § 40-47-200(7), (8),

and (12), Code of Laws of South Carolina (1976), and Regulation 81-60 of the South Carolina State Board of Medical Examiners, which are reproduced herein at Appendix, p. 55, except for the Due Process Clause.

STATEMENT OF THE CASE

This case involves an appeal to the South Carolina Supreme Court from the decision of the trial court affirming the Final Order of the State Board of Medical Examiners dated 23 May 1988, which found Petitioner Fasih Q. Zaman, M.D., guilty of professional misconduct and ordered that his license to practice medicine in the state be revoked.

The proceedings before the Board were initiated by Notice and Complaint dated 16 January 1986 alleging violations of §40-47-200 of the 1976 Code of Laws of South Carolina and the Principles of Medical

Ethics (Regulation No. 81-60 of the Board). Appellant denied the allegations of the Complaint and filed motions to strike and make more definite and certain, raising the due process notice issue, dated 29 August 1986; these motions were heard by the Board on 13 October 1986 and were denied on the merits by Orders dated 28 October 1986.

The only opportunity for an evidentiary proceeding in the case was before a panel of the Medical Disciplinary Commission on 9 December 1987. At that time Appellant's Counsel, Mr. Ross, had been informed by telephone from Pakistan the day before that Dr. Zaman was under medical orders not to fly to the United States due to chest pains and could not be in attendance at the hearing, so that both counsel moved for a continuance, which was denied. The hearing took place, with Mr.

Ross present but declining to attempt to cross-examine the witnesses in the absence of his client.

On 1 February 1988 a Final Order hearing, to be conducted on the record established at the panel hearing, was scheduled before the full Board of Medical Examiners, at which it considered a previously filed Motion to Remand the matter back to the evidentiary panel, based upon denial of due process in the proceeding ab initio, upon a denial of due process in taking evidence without a meaningful opportunity for cross-examination, and based upon the failure of the Board to permit the Petitioner to know the identity of his initial accuser. The motion provided copies of airline tickets for travel by Petitioner between Pakistan and the United States on 2 December 1988 and Affidavits by both Petitioner and his treating physi-

cian in Pakistan regarding his illness at the time of the panel hearing.

The Board granted a continuance of the proceedings before it and said that Dr. Zaman could appear before the Full Board at its next meeting and provide a "narrative" statement to it regarding the panel findings, together with Affidavits if he wished, but specifically providing that he could not utilize the "traditional question and answer format between counsel and witness" and declining to remand the matter to the panel for cross-examination of the witnesses. The "narrative statement" was to be limited to one and one-half hours in length.

A motion to reconsider this order was filed on 21 March 1988, again raising the due process objections. It was considered by the Board at its meeting of 27 April 1988 and denied. Counsel for Petitioner

declined to participate in the Board proceedings on that date, and the Board rendered its Final Order revoking Petitioner's license on 23 May 1988.

The matter was reviewed by the Circuit Court for the Fifth Judicial Circuit pursuant to the due process arguments and certain state law claims not here relevant and the Board's Order was affirmed by the Circuit Court on 9 November 1989. The South Carolina Supreme Court upon timely appeal raising the due process questions affirmed the Order of the Circuit Court by its Order previously noted.

REASONS FOR GRANTING THE PETITION

I. The Due Process clause demands that those whom the State proposes to deprive in a substantial fashion be given notice sufficient to enable them to respond to the charges against them at the time at which response is demanded by the State; the procedure specified by South Carolina denies on its face as well as as applied such an opportunity to accused physicians,

particularly those with training and backgrounds not majoritarian in the South Carolina context. This case offers this Court an opportunity further to elucidate the Mathews v. Eldridge standards for determining "what process is due" under what circumstances, an undertaking which would be valuable in light of the number of recent cases in the safety regulation area which have engaged the attention of the Federal judiciary.

The South Carolina Supreme Court noted in its opinion that

> Subsection (7) [of §40-47-200, 1976 Code of Laws] defines misconduct as a violation of medical ethics, subsection (8) prohibits unethical or unprofessional conduct, and subsection (12) specifically provides that a lack of professional competence constitutes misconduct for which a physician may be disciplined. (App. p. 5)

It then characterized an earlier opinion in an unrelated case as establishing that these subsections provide

> sufficient notice that a physician must conform his conduct to those standards of competence acceptable within the medical community of this State. (Id.)

The problem with all of this is that there is nothing in the statutes or regulations[1] which tells a physician anything about what constitutes those "standards of competence acceptable within the medical community of this State."

The manner in which the Board of Medical Examiners conducts its disciplinary proceedings - or, at least, the manner in which it conducted this one - is de-

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[1] The Regulation in question is #81-60 of the Board, App., p. ___. As will easily be seen, it is a general statement of medical ethics which establishes no guide to behavior in specific cases. Indeed, in response to a State law challenge to it not otherwise involved in this Petition, the State Supreme Court characterized it as essentially insignificant:

> In any event, even if Reg. 81-60 were declared void, the sanction imposed against appellant for violating s 40-47-200 would not be affected. Reg. 81-60 merely sets forth specific ethical principles incorporated in the general prohibitions of s 40-47-200. (App., p. ___.)

signed to give the surface appearance of fairness while, in fact, making it almost impossible for the physician charged with improper professional conduct to respond in a meaningful fashion. It does this by denying to the person in Appellant's position any meaningful information about the precise nature of his wrongful conduct. Thus, the person in Appellant's position finishes the fact-finding process without meaningful opportunity to cross-examine witnesses or to make his own case in response to the charges, and forever plays catch-up.

The Appellant has had no meaningful opportunity to present his side of this controversy and has been injured by the process as well as its outcome.

The State of South Carolina, through the Board of Medical Examiners, charged Appellant with "bad" medical practices

without ever telling him what was "bad" about them; the generalized statements in the statutes and the regulations have no effective meaning to convey - again, other than that a doctor should not do "the wrong thing," whatever that might be.

It is as though in a detailed description a defendant were to be charged with walking "wrongly" at a given time and place, with a minute description of his mode of walking, but with no description ever given of the **manner** in which his walking **violated the law.**

As Dr. Zaman's Affidavit (App., p. 89) shows, he was able to go down the list of patients involved and attempt to speculate as to what it was that the Board thought was a problem with his treatment of the patients involved. He was unable to come to conclusion as to what it was with which he was being charged in terms

of wrongful conduct. Thus, the net result of the approach taken by the Respondent is that it is able to say to a person in the position of Petitioner that he has "done wrong", and that he will be told how he has "done wrong" at the panel hearing in the matter, and may then respond.

An excellent illustration of the difficulty comes through a remark by the Respondent's chairman at the dismissal of the Appellant's Motion to Make More Definite and Certain that the matter was to be resolved by the Board's getting its experts, the Petitioner getting his experts, and for them all to appear before the Board, which would then [emphasis added] decide what standards to apply to determine the outcome of the issues. It is evident that this approach "stacks the deck" unduly: the Petitioner will never know until the hearing is over what it was

that he should have been preparing to address at the hearing - which, again, is then over. In other words, he does not know until it is too late against what it is that he is to defend.

This might be one thing in the context of ordinary, everyday activity which is understood in about the same way by just about everybody. But in this case the Respondent itself (in the remark described above) acknowledged that expert testimony and complicated analysis are the order of the day. Preparation to meet expert testimony requires ample information regarding the likely nature of the testimony.

Generally speaking, the nature of the process that is due a person faced with Government action adverse to him, before such action can be made effective, is dependent upon the nature of the depriva-

tion threatened. There is no question but that the loss of the right to practice a licensed vocation is a severe deprivation (see In Re Ruffalo, 390 U.S. 544, 88 S.Ct. 1222 (1968); Cf. Cleveland Board of Education v. Loudermill, 470 U.S. 532, 105 S.Ct. 1487 (1985); Perry v. Sindermann, 408 U.S. 593, 92 S.Ct. 2694 (1972); Board of Regents v. Roth, 408 U.S. 564, 92 S.Ct. 2701 (1972)). The South Carolina Supreme Court admitted it. (App., p. 8) Thus, the cases make clear that an individual threatened with deprivation of the right so to practice is entitled to a fair hearing prior to deprivation.

Due process requires that a fair hearing provide notice and an opportunity to be heard. The whole reason for this requirement is to enable an accused to know and understand the nature of the charges against him so as to enable him to

prepare to present his side to a neutral factfinder and judge. This principle continues to be reiterated by this Court, see, e.g., Martin v. OSHRC, ___ U.S. ___, 111 S.Ct. 1171 (1991) and the Federal judiciary generally (see, e.g., Rollins Environmental Services (N.J.) v. U.S. Environmental Protection Agency, ___ F.2d ___ (1991 WL 117319) (D.C. Cir. 5 July 1991); Gates & Fox Co. v. OSHRC, 790 F.2d 154 (D.C. Cir., 1986) (per Scalia, J.):

> 'If a violation of a regulation subjects private parties to criminal or civil sanctions, a regulation cannot be construed to mean what an agency intended but did not adequately express. . . . [T]he Secretary as enforcer of the Act **has the responsibility to state with ascertainable certainty what is meant by the standards he has promulgated.**' (790 F.2d at 156, citing from Diamond Roofing Co. v. OSHRC, 528 F.2d 645 (5th Cir. 1976); emphasis supplied)

As is pointed out in Brock v. Roadway Exp., Inc., ___ U.S. ___, 107 S.Ct. 1740 (1987)

> the constitutional requirement of a meaningful opportunity to respond before a . . . deprivation may take effect entails, at a minimum, the right to be informed not only of the nature of the charges **but also of the substance of the relevant supporting evidence.** (107 S.Ct. at 1749; emphasis supplied)[2]

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[2] In Roadway Justices Brennan and Stevens would have gone further than the plurality language quoted, holding that the particular procedure there involved deprived employers of due process to a more substantial extent than found by the plurality; both agreed with the quoted holding, producing a six-to-three determination that

> the . . . reinstatement order was unconstitutionally imposed in this case because Roadway **was not informed of the relevant evidence supporting [the] complaint and therefore was deprived of an opportunity to prepare a meaningful response.** (107 S.Ct. at 1751; emphasis supplied)

This issue was the primary point of the dissenters, Justices White, Rehnquist,

If the Board of Medical Examiners thinks something is wrong with what is being done in a doctor's practice, it ought to be able to do more than tell him that in a given instance he has done "wrong", which is all that the charges in this instance amount to.

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and Scalia, who said in relevant part:

> I would not ignore the strong interest the Government may have in particular cases in not turning over the supporting information, including the names of the employees who spoke to the government and who corroborated Hufstetler's claims, prior to conducting the full administrative hearing. (Id. at 1753; White, J., dissenting)

The case thus clearly stands for the proposition that a hearing is not a meaningful, fair hearing unless the subject of the hearing understands the charges against him sufficiently to enable him to respond to them. In cases like this one, this can only be done prior to the administrative hearing, because there is no opportunity (other than at the sufferance of the agency, which was denied here, App., p. ___) to develop any more evidence after the hearing is ended.

No doubt it is "easy" for the administrative agency - here, the Board - to say to a potential deprivee that something looks wrong with the way he has done some things, and that it will be explored at the evidentiary hearing on the matter - at which he has a right to be present and represented - to see whether the agency believes it to be actionable. However, it makes it impossible for the subject of the hearing - Dr. Zaman, here - adequately to prepare for his hearing.

The Board has taken the consistent position that it has in fact communicated sufficient information to the Appellant, stressing the fact that it has specified patient charts and described what the Appellant has done in treating the patients. The problem with the Complaint is not that it does not tell the Appellant that there are certain patients involved,

for it does. It is also not that it does not describe the treatment accorded (or allegedly accorded) to the patients by Dr. Zaman as the Board saw that treatment. It is, instead, this: **assuming the treatment to have been accurately described, there is nothing in the Complaint to specify what was supposed to be wrong with the treatment.**[3] Thus, the Appellant was put

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[3] The Board apparently takes the position that by reciting the principles of medical ethics in the Complaint it is meeting the requirement of providing the Appellant with sufficient notice of the nature of the charges against him.

With all due respect, the principles of medical ethics as recited amount to no more than a generalized injunction to do a good job. They are admirable statements of good goals, but such statements, as Justice Holmes once pointed out (Lochner v. New York, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting)), "do not decide concrete cases." That is why the legal profession is governed both by statements of general principles and by more specific instructions as to what is supposed to be done in given kinds of instances.

in the position of coming to face charges against him which were effectively unknown, although he had information indicating that his treatment was somehow challenged regarding certain patients.

The problem is particularly significant in professional disciplinary matters because proof there ordinarily entails the presentation of expert witnesses. In order to present expert witnesses, a person must know the subject upon which they must be expert. So, if the Board believes that excessive medication was administered in a given instance, it ought to be able to specify why the medication was "exces-

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The medical profession's lack of such specific guidelines means that the notice function must be filled by the Complaint, or at least by some information made available sufficiently in advance of the hearing to enable a person in Appellant's position to respond. The Board refuses to provide this information, as is well evidenced here by its denial of Appellant's Motion to Make More Definite and Certain.

sive" so that an expert preparing the case would know the standard adopted by the Board. Then, it will be available to the expert and the subject to decide whether to challenge the standard or the factual basis for the allegation. Presently, the subject - Dr. Zaman - is left only with the second half of that position: he can attempt to show that he did not do what he is alleged to have done, but cannot show that what he did was not "wrong" since the State has refused to tell him what was "wrong" about it.[4]

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[4] It may be argued that Dr. Zaman should have prepared against any eventuality. Respectfully, this is not proper. No individual doctor has the resources of the State, and to require a subject of investigation to attempt to prove the negative by first imagining all the things the State **might** be thinking are wrong with the situation and then preparing to disprove all of them at the hearing is simply a burden no one could bear; it amounts to giving the Board effective carte blanche to deal adversely with anyone whom its members might dislike, or who might have

This issue of notice is not a matter of formalistic insistence upon a technical requirement. It is only the presence of adequate, pre-existing standards which differentiates the rule of law from arbitrary, capricious, and potentially biased administration; it is this differentiation which creates and is the essence of an ordered but free society. As this Court recently expressed it, notice must include not only information that a hearing is about to occur but information as to what the hearing will entail -- including both "the nature of the charges [and] also . . . the substance of the relevant supporting evidence." Brock v. Roadway Express, 107 S.Ct. 1740, 1749 (1987) (Marshall, J., announcing judgment, joined by Blackmun,

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been trained in different medical traditions and practices from those of a majority of the Board - because no one could rationally attempt to meet that burden.

Powell, and O'Connor, JJ; emphasis supplied) (accord, id. at 1751 (Brennan, J.); id. at 1744 (Stevens, J.), discussed above. Nothing less permits the person threatened with deprivation to prepare sufficiently to avoid undue risk of an erroneous outcome. Thus, the constitutionality of a particular notice mechanism (here, the information provided by the Complaint) turns on whether the chosen method is "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." (Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950); See, also, Armstrong v. Manzo, 380 U.S. 545 (1965).)

Dr. Zaman did not have, as his Affidavit reflects, an adequate opportunity here to prepare to refute the charges

against him, because the Respondent consistently refused to specify what was wrong with his conduct other than in the general terms which can be seen in the Complaint, by reference to Regulation 81-60. Again, simply to say that prescription of certain drugs was "excessive" or that certain conduct violated "established norms" of medical procedure is insufficient. What use of those drugs would be NOT "excessive"? What standard would require the physician to "order a chest x-ray" (case specified in paragraph II, O., 1-4 of the Complaint) when he believed in the exercise of his medical judgment that there was no point to it? How, without knowing the standard, can he respond to

this charge? What are "established norms" of medical procedure?[5]

The importance of this issue cannot be overstated, for the need to have standards, again, is the essence of ordered government. Otherwise a judge - here, the Board acting as judge - can simply decide, based on the decisionmaker's own criteria formed **post hoc**, that a deprivation should be visited upon an accused. That is, simply, nothing more or less than straightforward arbitrary action, and it is this that the Board, with all due respect, wishes to be able to exercise and has been able to exercise. Ordered liberty re-

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[5] In a small society everyone may know the meanings of certain terms. However, the meanings of such terms as "medical standards" in the context of particular situations may vary when the society is larger, as the society of physicians in South Carolina has become over the past several years. These terms are unconstitutionally vague in this context.

quires that all know the standards against which their conduct is to be measured, in advance. Deprivation absent standards is arbitrary and capricious State action which denies the one deprived due process of law. Schloss Poster Adv. Co. v. Rock Hill, 190 S.C. 92, 2 S.E.2d 392 (1939). That is what has been done here,[6] and what the statute and procedures adopted by the Board will necessitate being done in all cases to one degree or another.

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[6] The Petitioner is puzzled by the Board's discussion below of the "two prong test" in private malpractice litigation. That standard is surely not relevant to a State's deprivation of a protected interest (here, Petitioner's license to practice medicine) without due process of law. To the extent that the argument proves anything, it proves that the Board could have met due process standards easily enough by consulting its experts prior to drafting its Complaint and putting their conclusions into the Complaint! This would have provided Dr. Zaman with an idea of what he was up against, and probably would have complied with due process standards.

Whether one accepts or not the entirety of Justice Frankfurter's due process approach, the articulation in Joint Anti-Fascist Committee v. McGrath, 341 U.S. 123, 160 ff (1951) (Frankfurter, J.) remains telling:

> 'Due process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances. Expressing as it does in its ultimate analysis respect enforced by law for that feeling of just treatment which has been evolved through centuries of Anglo-American constitutional history and civilizations, 'due process' cannot be imprisoned within the treacherous limits of any formula. Representing a profound attitude of fairness between man and man, and more particularly between the individual and government, 'due process' is compounded of history, reason, the past course of decisions, and stout confidence in the strength of the democratic faith which we profess. Due process is not a mechanical instrument. It is not a yardstick. It is a process. It is a delicate process of adjustment inescapably involving the exercise of judgment by

those whom the Constitution entrusted with the unfolding of the process.

. . . The precise nature of the interest that has been adversely affected, the manner in which this was done, the reasons for doing it, the available alternatives to the procedure that was followed, the protection implicit in the office of the functionary whose conduct is challenged, the balance of hurt complained of and good accomplished -- these are some of the considerations that must enter into the judicial judgment.

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The heart of the matter is that democracy implies respect for the elementary rights of men, however suspect or unworthy; a democratic government must therefore practice fairness; and fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights.

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Man being what he is cannot safely be trusted with complete immunity from outward responsibility in depriving others of their rights. At least such is the conviction underlying our Bill of Rights. That a conclu-

> sion satisfies one's private conscience does not attest its reliability. The validity and moral authority of a conclusion largely depend on the mode by which it was reached. Secrecy is not congenial to truth-seeking and self-righteousness gives too slender an assurance of rightness. No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it. (Emphasis supplied)

This case and many other U.S. Supreme Court cases establish that due process when an individual is threatened with a serious deprivation at the hands of the government requires that the individual be given sufficient information to enable him to understand the case against him and adequately respond to the charges made. Cf., State v. Rector, 158 S.C. 212, 155 S.E. 385 (1930).

The most complete recent formulation of the approach to be utilized in deciding

the question, "[W]hat process is due?" is found in the case of Mathews v. Eldridge, 424 U.S. 319, 335 (1976). Three distinct factors are to be considered: "First, the private interest that will be affected. . . ; second, the risk of an erroneous deprivation of such interest . . . and the probably value, if any, of additional or substitute procedural safeguards; and finally, the [state] interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."

In this instance, the individual's interest - the first factor - is of the most substantial nature. The charges against Dr. Zaman have already resulted in the revocation of his license to practice medicine in this State, thus depriving him

of his occupation here and severely damaging his reputation.

The second factor - the risk of erroneous deprivation and the probable ability to avoid that deprivation which would be adduced by additional safeguards - likewise weighs in favor of the Appellant. The charged doctor in these cases generally, as here, is given notice of conduct of his that is alleged to violate certain standards which are themselves notably imprecise. The imprecision in the standards could, however, presumably be made up by precision in the charges. This is what the Respondent Board alleges is in fact the situation. It is in fact not the situation. The Board has given the charged doctor in this case relatively thorough information about what it alleges was done by him. What it has not done is tell him what was supposed to be wrong

about what was done, except in the most general of terms. At the risk of belaboring the point, it is as though the State had a law against "harmful behavior" and an individual was charged with violating that law by doing various things. If the State law in the first instance defined "harmful behavior" and the conduct allegedly involved fell within the definitions, then the issues would be properly joined. However, if - as here hypothesized and as is the case in the Medical Board context - there is no definition in the State law, then the obligation of the State is to tell the person charged the nature of his crime: that conduct "X" is unlawful under the statute because it is harmful in that it _____.

This is truly enormously important. Unless it is done a defendant is put to the burden of proving the negative: that

his conduct no matter what could not have violated the law. This is fundamentally unfair. The State can sit back with its information - its knowledge of precisely what it intends to try to prove at the hearing - and watch the charged individual, with only his individual resources, flap about trying to figure out what the problem was with the conduct specified.[7] The individual must come to the hearing and try to be ready to refute all sorts of possibilities, because the State has refused a simple effort to say what was wrong with what was done.

The State responds that - as was said in the proceedings here by the Chairman -

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[7] Appellant respectfully would remind this Honorable Court that he attempted to gain the kind of specificity needed through Motions - to make more definite and certain, to remand once the nature of the charges had been made clear, and so forth.

that it is the purpose of the hearing to adduce the information necessary ("we bring our experts and you bring yours, and we decide"). With all respect, it seems to the Appellant that this proves his point: he cannot go behind the hearing without a remand from either the court or the agency, which is a matter of discretion,[8] so that the hearing is essentially

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[8] As the U.S. Supreme Court pointed out in Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985), delay in arriving at a determination can itself amount to a constitutional violation. The Court cites to Barry v. Barchi, 443 U.S. 55 (1979), involving a trainer for horses in harness racing suspended because one of his horses was found to have been given a stimulant; he protested his innocence and was suspended anyway, and New York law - although providing for a post-suspension hearing - did not provide for a hearing in a reasonable time period. This was insufficient, and violated Due Process.

Similarly in this situation, to say that Dr. Zaman might have had a remand at some unspecified time to enable the evidence-taking body to consider the evidence fully (the hearing panel is the only body which can take evidence according to due

his only chance to refute the charges. Being insufficiently informed of the nature of the charges to enable him to respond to them in the first instance, he could not function in that hearing.

The Respondent Board disingenuously has stated that it cannot imagine how much more information the Appellant could have been given other than that specified in the eventual Complaint against him. The answer, again, is clear: he could have been told what it was that he specifically was supposed to have done wrong, in addition to just what it was that he was supposed to have done. Then he would have

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process standards involving cross-examination and confrontation of witnesses - remember the refusal of the Board to permit a hearing with such guarantees before it, when it said that Dr. Zaman could present evidence not using the "traditional" question-and-answer format) is simply to admit that he was denied due process under the circumstances in fact present in the case.

had an opportunity to confront and cross-examine adverse witnesses in a meaningful way. See, Goldberg v. Kelly, 397 U.S. 254 (1970); Greene v. McElroy, 360 U.S. 474, 496-497 (1959). ("the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. . . .")

This mode of handling medical professional discipline is unfortunately not uncommon. The physician is put often to the task of proving the negative, and the ability of the professional disciplinary

body to set standards through case-by-case determination with no more specific guidelines than those specified in the statutes here utilized is an open invitation to discriminatory enforcement of the law. Dr. Zaman was not a local product, and quite possibly did not have an understanding of the "prevailing" local standards of practice; although he does not challenge the ability of the Board to discipline him if he has transgressed a legitimately drawn line, he believes he is entitled to know the location of the line before being tried for having crossed it. In broader terms, the public interest, professional discipline and the state of the medical profession would be much enhanced by the disciplinary bodies having to articulate more specific guidelines for professional behavior than those here specified. The legal profession has done it (see the

Rules of Professional Conduct); there would appear to be no obvious reason why the medical profession should not.

Dr. Zaman was not and is not a part of the Medical "Establishment" in the State of South Carolina. His training was not perhaps the same as that provided the physicians making up the Board of Medical Examiners. He is symbolic of some of the changes going on in South Carolina at the present time, and whether his conduct be deemed reprehensible in the abstract or not it is the case that persons not a part of the "society of physicians" from education and birth in this State are nonetheless equal participants in its legal structure. Dr. Zaman provided care to large numbers of persons. He is due the courtesy of reasonable legal treatment, and the national judiciary should ensure it to him.

Petitioner would finally note that the foregoing discussion is intended to show both the unfairness of the actual decisionmaking process in use in such instances in this State and the potential utility of that process as a vehicle for this Court to utilize in elaborating upon or explicating the analytical process which should be utilized to determine the nature of the process to be accorded to this sort of deprivation and other penalty-generating governmental regulatory activity.

II. The two remaining questions should be taken up by this Court to redress an egregious failure of the South Carolina judiciary to accord procedural due process in this individual case, for unknown reasons.

It is hornbook law that the right to confront one's accusers and cross-examine them is an essential element of due process (Cf. Green v. McElroy, 360 U.S. 474,

497 (1957); Coy v. Iowa, ___ U.S. ___, 108 S.Ct. 2798 (1988)),[9] so that it simply cannot be done away with. It is no excuse to say that one of Petitioner's attorneys had some months before discussed his case preparation with him, for the utility of any such preparation is dependent upon the

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[9] Quoting, among others, President Eisenhower in stating that "[i]n this country, if someone dislikes you, or accuses you, he must come up in front. He cannot hide behind the shadow." 108 S.Ct. at 2801. Justice Scalia, for the Court, went on to say:

> The perception that confrontation is essential to fairness has persisted over the centuries because there is much truth to it. A witness 'may feel quite differently when he has to repeat his story looking at the man whom he will harm greatly by distorting or mistaking the facts. He can now understand what sort of human being that man is.' Z. Chafee, The Blessings of Liberty 35 (1956), quoted in Jay v. Boyd. . . . (Id. at 2802)

This is fundamental.

presence of the accused in the hearing room for instantaneous consultation and discussion.

The only remaining question in this area is the one centering around Respondent's handling of the Motion to Cancel or Remand dealt with on 1 February 1988 and subsequent events. It is essential to understand that by this point the hearing panel had made its revocation recommendation, and the only evidence in the case had been gathered by it in the involuntary absence of the Petitioner. Petitioner was not to be accorded any opportunity for a hearing before the panel that had initially evaluated the evidence, nor was he to be given the opportunity to cross-examine in a meaningful fashion the persons presenting evidence to that panel. Instead, he was told he could present Affidavits and could make a personal presentation to

the Board, not in the "usual question and answer" method. Since due process rights can be waived, Dr. Zaman did not appear at the Board meeting to make such an ineffective statement.[10]

There was nothing that Appellant could have done which would be meaningful at hearings of any sort before the Board itself, since no activity there would alter the fact that evidence had been taken before the panel in Petitioner's involuntary absence without the opportunity thus accorded him to cross-examine the witnesses. Appellant was to be denied any opportunity to cross-examine the witness-

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[10] The Order of Judge Caldwell indicates that he felt that Dr. Zaman was in the country and "abruptly left just two days before the scheduled hearing." There is no evidence to this effect, and there is evidence to the contrary. This was one of the reasons assigned by Judge Caldwell for upholding the Board's Order, and by itself would warrant reversal.

es, or to present his case to the panel, under all approaches to the matter proffered by the Board. Had he proceeded under these circumstances, he would have been participating in a mere charade, designed to make the record look prettier from the standpoint of the Board.

The fact is that Petitioner could not attend the evidentiary hearing through no fault of his own, his presence was Constitutionally necessary, and the Respondent for reasons of its own convenience refused to create an opportunity for him to participate meaningfully in the factfinding process. The reference of the South Carolina Supreme Court to a "waiver" of the right is hardly apposite when, as is recited above, the record clearly shows that Dr. Zaman provided copies of his physician's Affidavit and his own Affidavit (with copies of the airline tickets he had

already purchased for timely travel to South Carolina from Pakistan); what else could he have done? As will be seen below, there is a similar peculiar omission to consider the record regarding the claim that Dr. Zaman had the right to know his accuser.

In this situation already there has been a determination that prejudicial activity aimed against the Petitioner by members of the larger medical community - activity designed to "get" the Petitioner - has taken place. See In re Dr. F.Q. Zaman, ___ S.C. ___, 329 S.E.2d 436 (1985), in which the South Carolina Supreme Court pointed out that

> [h]aving three of respondent's original accusers sit also as his jury is a direct violation of respondent's right to a fair and meaningful hearing under the due process clause.

In proceedings below the Board engaged in a great deal of discussion of the nature of "privileged" communications. It cited a Federal Supreme Court decision (Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 98 S.Ct. 1535 (1978)) which holds unconstitutional a criminal provision protecting confidentiality in judicial disciplinary proceedings, while assuming confidentiality to be appropriate. Entirely aside from the fact that the State interest in secrecy for judicial disciplinary proceedings is both evident and entirely different from the situation presenting itself in medical disciplinary proceedings, the holding of the case is just not relevant to the instant situation, and is favorable to Petitioner to the extent it might be thought relevant. Of course, there can be all the statutes about confidentiality anyone wants; they

are not controlling in the face of contrary Constitutional requirements.

More to the point is Willner v. Committee on Character and Fitness, 373 U.S. 96 (1963). In that case, a person who had passed the New York Bar Examination was denied admittance to the Bar; he said that he had been at one point shown a letter from a New York attorney who had made adverse accusations about him, but was never permitted to confront him on the record, that there was another lawyer who had promised to "destroy" the applicant, and that two members of the Committee were "in cahoots" with that lawyer. He wanted to exercise his right of confrontation. This Court said he had that right:

> We have emphasized in recent years that procedural due process often requires confrontation and cross-examination of those whose word deprives a person of his livelihood. * * * We think the need for confronta-

> tion is a necessary conclusion from the requirements of procedural due process in a situation such as this. (373 U.S. at 103 - 104; citations omitted)

Here, there is at least some indication of vendetta against Dr. Zaman. We do not even know whether the elementary requirement, affirmed in his own case, supra, that he be accorded a fair and impartial decisionmaking process by not having an accuser judge him, was in fact accorded him in this case. He has a right under our Constitution to know his accuser(s) in this case[11] and to understand the full nature of the proceedings against him. That has been denied him, and reversal and

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[11] He should be able to confront the accuser(s) and ascertain what ties, if any, he, she, or they might have to any member of the panel taking evidence or to the members of the Board of Medical Examiners. There ought to be no place in our system of justice for anonymous accusations and subsequent Star Chamber proceedings.

remand for the purposes of disclosure and investigation is the only remedy which will undo the damage so far done. The South Carolina Supreme Court ignored, for reasons best known to itself, the clear statements that Dr. Zaman needed to know his accuser in the record in Dr. Zaman's Affidavit (App., p. 97) and in the original Answer to the initial Complaint, so that - directly contrary to the position of the South Carolina Supreme Court in its Opinion in this case (App., pp. 9-10) there is no question but that the issue had been raised and the possibility of prejudice suggested throughout the case.

Thus, Dr. Zaman's individual situation has been substantially distorted by the Supreme Court of the State; one can only speculate as to the reasons, but Petitioner urgently and respectfully requests that this Honorable Court not per-

mit such an unfair approach to decision-making to stand.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

Columbia, S.C.
___ August 1991

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APPENDIX

APPENDIX

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OPINION, SOUTH CAROLINA SUPREME COURT

GREGORY, C.J.

1 This is a physician disciplinary matter. The circuit court affirmed the revocation of appellant's license to practice medicine in South Carolina. We affirm.

Appellant has lived in Pakistan since June 1985. In January 1986, the State Board of Medical Examiners (Board) filed a complaint against appellant alleging incompetent treatment of twenty-four patients between the years 1980 and 1982. The allegations involve neglect, improper medical treatment, and the administration of excessive dosages of narcotics and analgesics. An evidentiary panel hearing was held December 9, 1987. Appellant was not present. Counsel for appellant moved for a continuance on the ground appellant was ill and could not travel from Paki-

stan. No supporting evidence was produced and the motion was denied.

The State presented evidence concerning nine of the twenty-four patients referred to in the complaint. After the panel recommended sanctions, a hearing before the Board was scheduled for February 1, 1988. Appellant did not appear on that date. Counsel moved to remand to the panel for an evidentiary hearing. Counsel produced an affidavit from appellant's treating physician indicating appellant had consulted the physician on December 5, 1987, for chest pains and he had diagnosed appellant as having "acute coronary insufficiency." The affidavit was dated January 7, 1988.

The Board issued an order on February 19, 1988, denying the motion for remand and scheduling a Board hearing for April 27, 1988. The order provided that appel-

lant could: (1) submit affidavits to the Board from expert witnesses regarding appellant's care of the named patients; and (2) make a narrative statement to the Board concerning his position. Appellant moved to reconsider the order as providing inadequate relief and reiterated the request for a remand.

On April 27, the Board met and considered counsel's argument on the motion. Appellant was not present. The Board denied the motion. On May 23, 1988, the Board issued its final order revoking appellant's license to practice medicine in this State. It found the State's evidence demonstrated a pattern of unethical and incompetent medical practice which contributed to the death of some of his patients. On appeal, the circuit court affirmed. Appellant claims his due process rights were violated because he was

not given adequate notice of the charges against him. He contends notice is inadequate

because the complaint does not set forth the proper medical treatment that should have been rendered.

The complaint sets forth in great detail appellant's medical treatment of each patient and alleges he violated S.C. Code Ann. s 40-47-200(7), (8), and (12) (1986). Subsection (7) defines misconduct as a violation of medical ethics, subsection (8) prohibits unethical or unprofessional conduct, and subsection (12) specifically provides that a lack of professional competence constitutes misconduct for which a physician may be disciplined. In Toussaint v. State Board of Medical Examiners, --- S.C. ----, 400 S.E.2d 488 (1991), this Court held subsections (8) and (12) provide sufficient notice that a physician must conform his conduct to those standards of competence acceptable within the medical community of this

State. The complaint here clearly puts appellant on notice that the treatment alleged was not acceptable under this standard. We hold appellant was given adequate notice of the charges as required by the Due Process Clause.

*2 Appellant next contends that Reg. 81-60, entitled "Principles of Medical Ethics," is void because it was promulgated by the former Board which was found by this Court to be unconstitutionally composed. See Toussaint v. State Board of Medical Examiners, 285 S.C. 266, In S.E.2d 433 (1985). The State, on the other hand, claims the regulations promulgated by the former Board are valid under the de facto doctrine.

In State ex rel. McLeod v. West, 249 S.C. 243, 153 S.E.2d 892 (1967), this Court held that our tate Senate could validly perform all its legislative func-

tions until the next general election after it was found unconstitutionally composed under federal law. See also State ex rel. McLeod v. Court of Probate of Collection County, 266 S.C. 279, 223 S.E.2d 166 (1975) (official acts of de facto judge held valid). We hold this same de facto principle applies to the acts of the former Board to render regulations it promulgated valid. In any event, even if Reg. 81-60 were declared void, the sanction imposed against appellant for violating s 40-47-200 would not be affected. Reg. 81-60 merely sets forth specific ethical principles incorporated in the general prohibitions of s 4047200.

Appellant claims the Board's refusal to remand the case to the panel for an evidentiary hearing deprive him of the right to effective cross-examination of the witnesses against him. [FN1]

When the State seeks to revoke a professional license, procedural due process rights must be met. Greene v. McElroy, 360 U.S. 474, 79 S.Ct. 1400, 3 L.Ed.2d 1377 (1959); Brown v. South Carolina Board of Education, --- S.C. ----, 391 S.E.2d 866 (1990). Where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses. Goldberg. v. Kelly, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970); Brown, supra.

We agree with appellant that the Board's order allowing him to submit affidavits and give a narrative version of the facts does not satisfy the right to cross-examination of adverse witnesses. The dispositive question is whether appellant waived this right by failing to appear at the original evidentiary hearing.

One cannot complain of a due process violation if he has recourse to a constitutionally sufficient administrative procedure but merely declines or fails to take advantage of it. Dusanek v. Hannon, 677 F.2d 538 (7th Cir. 1982). Here, counsel moved at the panel hearing for a continuance without any evidence to support the need for one. Based on the record, we hold there was no abuse of discretion in refusing a continuance and appellant waived his right to cross-examination by failing to appear at the panel hearing. Finally, appellant complains his due process rights were violated because the Board refused to disclose the identity of the original complainant testifies against the accused physician. *3 We need not address this issue since there is not record of what, if anything, appellant requested, whether it was refused, and if

so, why. The first time this subject appears in the records is in the exceptions to the Board's final order; the record provides no factual basis for raising this issue on appeal. Facts set forth in an exception will not be considered on appeal unless supported in the transcript of record. Greenville Memorial Auditorium v. Martin, --- S.C. ----, 391 S.E.2d 546 (1990). This issue is not preserved and we decline to consider it.

Accordingly, the judgment of the circuit court is AFFIRMED.

HARWELL, CHANDLER, FINNEY AND TOAL, JJ., Concur.

FN1. Appellant's counsel was present at the panel hearing but declined to cross-examine the State's witnesses.

ORDER OF THE CIRCUIT COURT

This matter is before the Court pursuant to the South Carolina Administrative

Procedures Act (Section 1-23-380 of the 1976 Code of Laws of South Carolina, as amended) (APA), seeking judicial review of the Final Order of the State Board of Medical Examiners (the Board) dated May 23, 1988. Petitioner was represented by Randall M. Chastain, Esquire, and H. Fulton Ross, Esquire. The Respondent Board was represented by Richard P. Wilson, Assistant Attorney General. The Petitioner's attorneys filed two separate petitions for review, which were consolidated on January 30, 1989. The case was heard on September 27, 1989, and written briefs or memoranda thereafter were submitted. Upon review of the record and consideration of the briefs and arguments of counsel, this court finds that Petitioner's arguments are without merit and that the decision of the Respondent Board

should be affirmed for the following reasons.

The scope of judicial review in case arising under the APA is statutorily established by § 1-23-380 (g), which in effect requires that the decision of the Board will not be overturned by a reviewing court unless it is unsupported by substantial evidence of record. In Lark v. Bi-Lo, 276 S.C. 130, 276 S.E.2d 304 (1981), the Supreme Court stressed that substantial evidence is "evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached...." The Court emphasized that "[t]he possibility of drawing two inconsistent conclusions from the evidence does not prevent the agency's findings from being supported by substantial evidence." Id. at 136; Brown v. R.L. Jordan Oil Co.,

291 S.C. 272, 353 S.E.2d 280 (1987). The weight to be ascribed to particular testimony is for the agency to determine and not the reviewing court. § 1-23-380 (g); Gibson v. Florence Country Club, 282 S.C. 384, 318 S.E.2d 365 (1984). In this case, however, the facts and expert opinions presented by the State are entirely uncontroverted. Accordingly, substantial, indeed overwhelming, evidence of Respondent's numerous acts of professional misconduct is found in the record. Therefore, if any relief is to be granted Petitioner, it must be based upon one of the technical grounds presented for review.

At the outset, the Respondent Board has objected to the vague and unspecific exceptions or grounds for review presented by Petitioner in his consolidated petitions. Although Petitioner's argument on appeal is based exclusively upon Mr.

Chastain's Petition, dated June 2, 1988, which is an impermissible shotgun approach, I nonetheless find that those grounds contained in Mr. Ross' Notice of Appeal, dated June 22, 1988, provide an adequate basis for purposes of judicial review.

Petitioner first contends that the complaint did not give adequate notice regarding the alleged acts of misconduct referenced therein. A review of the very detailed allegations of the complaint, however, reveals that the complaint in this case far exceeds that minimum requirements of Section 1-23-320 of the APA, including references to particular sections of the statutes and regulations involved and sufficiently detailed statements of the matters asserted which include, among other things, specific dates, patients, medical procedures involved, and

deficiencies by Petitioner. Accordingly, Petitioner's argument is patently without merit.

Petitioner also claims that he was denied an opportunity to be heard and to confront witnesses against him. The record, however, clearly demonstrates that proper notice and opportunity to be heard was provided at every stage of the proceedings below. At least one and sometimes both of Petitioner's attorneys appeared and participated at every stage. Nevertheless, Petitioner further contends that he was denied the right to be heard in person despite unquestionably having been provided by the Board with numerous opportunities to personally appear and participate in the proceedings. Furthermore, on the last such occasion, the record indicates that Petitioner was in South Carolina just two days before the

scheduled hearing and then left abruptly without explanation and without making an appearance. Accordingly, his argument is manifestly without merit.

Petitioner also contends on appeal that the Board's regulations, of which he has been found in violation, are null and void because they were not repromulgated following the decision in Toussaint v. State Board of Medical Examiners, 285 S.C. 266, 329 S.E.2d 433 (1985), which held that the Board was unconstitutionally composed. He does not contend that the subject regulations were unlawfully promulgated, but that they there subsequently nullified by the decision in Toussaint. That case contains no such holding and Petitioner cites no supporting authority for his position. INdeed, both the United States Supreme Court and South Carolina Supreme Court, among others, have refused

to invalidate prior actions in similar situations in accordance with the de facto doctrine. See Buckley v. Valeo, 424 U.S. 1, 96 S.Ct. 612 (1976); Northern Pipeline Co. v. Marathon Pipeline Co., 458 U.S. 40, 102 S.Ct. 2858 (1982); McLeod v. Court of Probate of Colleton Co., 266 S.C. 279, 223 S.E.2d 166 (1975); State ex rel. McLeod v. West, 249 S.C. 243, 153 S.E.2d 892 (1967). The Board's regulations were lawfully enacted prior to the Board itself being declared unconstitutional, therefore, this argument, too, is without merit.

Petitioner has also alleged that he was not provided "sufficiently definite standards" by way of detailed regulations to govern his professional conduct. The record clearly establishes that the standards for evaluating Petitioner's conduct in this case were observed. Cox v. Lund, 286 S.C. 410, 334 S.E.2d 116 (1985);

Pederson v. Gould, 288 S.C. 141, 341 S.E.2d 633 (1986). Expert testimony was properly used to establish both the standard of medical practice in similar situations and Petitioner's deviations therefrom. The law simply does not require the Board, as Petitioner asserts, to prescribe exact rules governing all possible phases of medical care with precision and exactness. Sosa v. Board of Managers of Val Verde Memorial Hospital, 437 F.2d 173 (5th Cir. 1971.) Pederson, 341 S.E.2d at 634 (quoting Cox v. Lund, 334 S.E.2d at 118). In this case, there was competent expert testimony regarding both prongs of the Cox test in every instance of alleged misconduct. The test was properly met and Petitioner's argument is without merit.

Petitioner next contends that the charges have not been brought in a timely fashion and should be barred by the doc-

trine of estoppel by laches. In Midlands Utility v. SCDHEC, ____ S.C. ____ (Op. No. 22992, filed 3/27/89), the Supreme Court stated the rule regarding estoppel against a public body:

> A party claiming estoppel against a public body must show: (1) a lack of knowledge and the means of knowledge of the truth as to the facts in question; (2) justifiable reliance upon the conduct of the party estopped; and (3) a prejudicial change in position. Landing Development Corp. v. City of Myrtle Beach, 285 S.C. 216, 329 S.E.2d 423 (1985).

Since the Petitioner has failed to make any of the required showings, his argument is clearly without merit.

Petitioner further contends that the Board erred in refusing to produce the identity of the initial complainant. His argument, however, ignores the confidentiality provisions of Sections 40-47-212 and 40-47-213, and duly promulgated regula-

tions of the Board, which make the initial complaint privileged. Since he has not challenged the constitutionality of any of the relevant statutes and regulations, his argument apparently assigns error to the Board's faithful compliance with applicable law and the public policy of the State. When viewed in context with Section 40-47-200 concerning preliminary investigations and formal disciplinary proceedings, Petitioner's contention becomes even less credible, because the original complainant neither becomes a party to the proceedings nor exercises any control over them. Accordingly, it is clear that, if error at all, it was harmless error. Petitioner's argument, therefore, it entirely without merit.

Petitioner also contends that he was not given the right to compel the testimony and attendance of witnesses. The re-

cord, however, fails to demonstrate that he made any such requests. Section 1-23-320 (d) of the APA plainly states, "The agency hearing a contested case may issue in the name of the agency subpoenas for attendance and testimony of witnesses..., upon request, on behalf of any other party to the case." (Emphasis added.) By his failure to request that subpoenas be issued, Petitioner waived that right. Therefore, his argument on appeal is clearly frivolous.

Similarly, Petitioner's argument that the Board failed to disclose the evidence against him is patently without merit. A review of the record discloses that the evidence against Petitioner was properly presented and served as the sole basis upon which the Board based its decision.

Petitioner's remaining grounds appear either not to have been raised below or to

have been abandoned on appeal and are dismissed for those reasons without discussion.

After careful review, I have found no merit to Petitioner's positions on any ground. In fact, I find most of his positions to be ludicrous in view of the evidence and his failure to participate in the proceedings.

In summary, the Petitioner had proper notice of his alleged misconduct, and he was afforded an opportunity to be heard and to confront witnesses against him. The regulations of the Board were not invalid merely because they were enacted prior to the Board being declared unconstitutional. The evidence overwhelmingly supports the Board's decision and the appeal has not merit.

THEREFORE, IT IS ORDERED that the decision of the Board be affirmed and Petitioner's appeal be dismissed.

AND IT IS SO ORDERED.

FINAL ORDER OF THE STATE BOARD

STATEMENT OF THE CASE

On or about January 16, 1986, the Executive Director of the State Board of Medical Examiners (the Board) filed and served a notice and Complaint against Fasih Q. Zaman, M.D., Respondent, who is a physician duly licensed by the Board to practice medicine in South Carolina. On or about December 9, 1987, after proper notice, a Hearing was held before a Panel of members of the Medical Disciplinary Commission pursuant to Section 40-47-200 and Regulations No. 81-15 and 81-16 of the 1976 Code of Laws of South Carolina, as amended. The State was represented by Richard P. Wilson, Assistant Attorney General. The Respondent did not appear but was represented by H. Fulton Ross, Jr., Esquire, and Randall M. Chastain, Esquire, who, among other things, present-

ed an oral motion for continuance, which was unsupported by affidavit or other evidence, and which accordingly was denied. Mr. Ross thereafter participated in the hearing as counsel for Respondent.

Following receipt of the Hearing Panel's Report, a Final Order hearing was noticed and scheduled for Monday, February 1, 1988, at the Town House Hotel, 1615 Gervais Street, Columbia, South Carolina, at which time, Mr. Chastain, as counsel for Respondent, presented a motion to cancel the scheduled Final Order hearing and remand the matter to the Hearing Panel for the taking of additional testimony at such time as Respondent "could conveniently be present (as he desires) ...." Resolving any doubt in favor of the Respondent, the Board, by Order dated February 19, 1988, elected to continue the matter until the next meeting of the Board on

April 27, 1988, and afford him an additional opportunity to appear and be heard. In the February 19, 1988, Order, the Board provided the Respondent various options as to how he could present further evidence, including, but not limited to, the use of affidavits.

On April 27, 1988, at the Omni Hotel, Charleston, South Carolina, Mr. Chastain appeared as counsel for Respondent and presented argument in support of a motion for reconsideration of the Board's Order of February 19, 1988, which was denied. Respondent did not personally appear at that time or present any evidence or argument concerning the allegations of the Complaint despite the opportunity to do so which was extended over two months before the scheduled time for further hearing. Counsel specifically stated that he did not wish to participate further in the

proceedings and left the hearing. No request for a continuance was made or any explanation whatsoever offered for Respondent's failure to appear.

After considering the testimony and exhibits presented, the Board does hereby make the following Findings of Fact and Conclusions.

FINDINGS OF FACT

The Board finds:

1. The Respondent is a physician duly licensed by the Board to practice medicine in South Carolina. He practiced medicine in Gaffney, South Carolina, during the times alleged in the Complaint, but reportedly has resided in Pakistan for approximately the last two and one-half (2½) years.

Patient A

2. Patient A, a 45-year-old male patient of Respondent, was admitted on

December 4, 1980, to the Cherokee County Memorial Hospital at approximately 5:30 p.m., and died less than 12 hours later at approximately 4:25 a.m. The hospital records indicate that this patient was critically ill suffering from respiratory failure due to pneumonia. Librium and Mepergan, but no antibiotics, were ordered by Respondent by telephone at the time of admission. Respondent did not see the patient until approximately 10:30 p.m., and did not personally attend the patient again that evening despite notifications by the hospital staff of the patient's steadily deteriorating condition. Respondent did not order the patient to be intubated or ventilated. Respondent, without documented permission, ordered that this patient not be resuscitated when he died at approximately 4:25 a.m.

3. An expert medical witness reviewed the records concerning this case and rendered his expert opinion as to Respondent's performance. He expressed concern over, among other things, Respondent's inadequate documentation of the medical record, his use of contraindicated drugs, and his inappropriate therapy in the treatment of this patient which, in his opinion, contributed to his death. He further expressed concern over Respondent's failure to properly attend to the patient's medical needs and his order, without documented permission, not to resuscitate the patient. In his expert opinion, such conduct represented substandard care which was outside the range of acceptable medical treatment in similar situations. The Board agrees and so finds that Respondent's treatment in this case was below the standard of care expected of

competent medical practitioners in similar situations in this State and that the allegations of the Complaint have been proven.

Patient B

4. Patient B, a 61-year-old female patient of Respondent, entered the emergency room of the Cherokee Memorial Hospital on March 21, 1982, complaining of acute lower back pain. She was found to have high blood pressure and tremendous swelling of the legs, as well as severe tenderness of the low back. By telephone, Respondent ordered routine laboratory work to do done and Demerol and Zomax to be administered. Respondent did not see the patient until the following day. On her admission, the patient had indications of decreased kidney function, which condition steadily deteriorated. Respondent ordered no tests to determine the cause of her

deteriorating kidney function. Respondent ordered anti-hypertensive medication and continued it for at least 48 hours after the patient had become hypotensive. He ordered no vasopressor agent to be administered when she became hypotensive. Respondent treated the patient with a non-steroidal inflammatory drug (Naprosyn) in spite of her renal failure. On admission, the patient was also found to be anemic, according to the hemoglobin tests, which levels fell by March 30, 1982, but the Respondent did not check it thereafter. The Respondent ordered the insertion of a subclavian catheter but did not order a chest x-ray thereafter.

5. After noting steady deterioration of the patient's condition in his progress notes on April 7, April 8, and April 9, 1982, the Respondent, without documented permission, ordered that no

resuscitation be attempted, and the patient expired on April 9, 1982.

6. An expert medical witness reviewed the records concerning this case and rendered his expert opinion as to Respondent's performance. He expressed concern over, among other things, Respondent's failure to properly evaluate the patient and properly document the patient's medical record and the medical justification for the therapy utilized by Respondent in his treatment of the patient. He further expressed concern over Respondent's failure to properly attend to the patient's medical needs or seek appropriate consultation or transfer to another facility, as well as his use of contraindicated drugs. In his expert opinion, such conduct represented substandard care which was outside the range of acceptable medical treatment in similar situations.

The Board agrees and so finds that Respondent's treatment in this case was below the standard of care expected of competent medical practitioners in similar situations in this State and that the allegations of the Complaint have been proven.

Patient C

7. Patient C, a 61-year-old patient of Respondent with known emphysema, was admitted without being seen by Respondent, on April 12, 1981, to the Cherokee County Memorial Hospital suffering from acute respiratory failure. The patient had a long history of prior hospitalizations for the same conditions which were not getting better. Respondent ordered this patient treated with, among other things, depressants such as Endep and Valium. He rapidly deteriorated until April 14, 1981, when he was intubated and placed on a respirator, at which time depressants were dis-

continued and he began to improve. There appears to have been no investigation by Respondent of the possible causes of the patient's symptoms or any consultation as to why he was continuing to have problems. The patient was discharged on April 22, 1981.

8. On May 6, 1981, the patient was re-admitted for acute respiratory failure without being seen by Respondent. Respondent ordered this patient again treated with, among other things, Endep, Valium, and Demerol, as well as Aminophylline which subsequently was not measured. Peripheral edema with ankle swelling was noted but apparently not investigated. Other appropriate tests were not performed. The patient was discharged on May 13, 1981.

9. On May 15, 1981, the patient was again re-admitted for acute respiratory

failure without being seen by Respondent. Respondent ordered by telephone the administration of Demerol, Valium, and Elavil. Theophylline and Metaproterenol also were ordered as well as the administration of fluids at high rates. During this hospitalization and until his death, only one theophylline level (5/23/81) was ordered by Respondent despite the subsequent administration of Aminophylline and I.V. fluids. The patient's legs became increasingly swollen and pulmonary edema was noted, but Respondent generally did not investigate or treat possible etiologies or initiate appropriate prophylactic measures. No consultations were sought. Valium, Demerol, Endep, and other drugs were inappropriately ordered by Respondent at various times during this hospitalization. The patient was repeatedly placed on and taken off a respirator during this

time while Respondent continued to employ sedative therapy. The patient's condition deteriorated. Respondent, without documented permission, ordered that this patient not be resuscitated when he died on July 5, 1981.

10. An expert medical witness reviewed the records concerning this case and rendered his expert opinion as to Respondent's performance. He expressed concern over, among other things, Respondent's inadequate documentation of the medical record, his use of contraindicated drugs, and his inappropriate therapy in the treatment of this patient which, in his opinion, contributed to his death. He further expressed concern over Respondent's failure to properly attend to the patient's medical needs and his order, without documented permission, not to resuscitate the patient. He also ex-

pressed concern over Respondent's repeated failure to seek appropriate consultation or transfer to another facility and his recurring failure to order appropriate tests or perform necessary diagnostic studies to prevent recurrent hospitalizations. In his expert opinion, such conduct represented substandard care which was outside the range of acceptable medical treatment in similar situations. The Board agrees and so finds that Respondent's treatment in this case was below the standard of care expected of competent medical practitioners in similar situations in this State and that the allegations of the Complaint have been proven.

Patient D

11. Patient D, a 53-year-old male patient of Respondent with known emphysema and heart disease, was admitted on March 30, 1981, to the Cherokee County Memorial

Hospital suffering from acute respiratory failure. Respondent treated the patient with, among other things, Valium, Demerol, Aminophylline, and Theobid. Respondent apparently attempted no evaluation of the patient's cardiopulmonary condition or other complaints. He was discharged on April 15, 1981.

12. On September 11, 1981, the patient was re-admitted with acute respiratory failure. The Respondent treated the patient with, among other things, Demerol, Viosterol, Valium, Endep, Aminophylline, and Theobold. He was subsequently placed on a respirator and administered steroids and intravenous saline. There was evidence of congestive heart failure. Respondent ordered intermittent Lasix but no Digitalis. The patient was discharged on November 11, 1981.

13. The patient was re-admitted on several occasions thereafter for the same complaints. Respondent treated the patient with, among other things, Valium, Dalmane, Nubain, Thorazine, and Elavil.

14. On April 22 through April 26, 1982, and on May 3 through June 1, 1982, the patient was re-admitted to the hospital with the same conditions and the same course of treatment was followed. Respondent ordered all medications stopped, including Lasix, prior to his discharge on June 1, 1982, despite evidence of increasing edema. Within 48 hours of his discharge from the Cherokee County Memorial Hospital on June 1, 1982, the patient entered the emergency room of the Spartanburg General Hospital in Spartanburg, South Carolina, suffered cardiac arrest and died.

15. An expert medical witness reviewed the records concerning this case and rendered his expert opinion as to Respondent's performance. He expressed concern over, among other things, Respondent's inadequate documentation of the patient's medical record, his use of contraindicated drugs and his inadequate therapy in the treatment of this patient which, in his opinion, contributed to his death. He further expressed concern over Respondent's failure to properly attend to the patient's medical needs and his failure to demonstrate any systematic work-up of the patient's complaints. In his expert opinion, such conduct represented substandard care which was outside the range of acceptable medical treatment in similar situations. The Board agrees and so finds that Respondent's treatment in this case was below the standard of care

expected of competent medical practitioners in similar situations in this State and that the allegations of the Complaint have been proven.

Other cases

16. Five additional cases were also reviewed as representative of the contention that Respondent repeatedly failed to properly document patients' conditions, perform appropriate work-ups and investigations of their underlying medical problems, attend to their medical needs and take appropriate measures and properly prescribe medications.

17. In the case of Patient E, a 42-year-old female patient of Respondent, the record indicates that beginning in January, 1981, and continuing until March, 1982, this patient was admitted the Cherokee County Memorial Hospital four times for a total of 33 days with diagnoses of

flu, obesity, headache, and renal calculi. During her 33 days of hospitalization, the patient received approximately 129 injections of Demerol, approximately 48 doses of Zomax, approximately 28 doses of codeine, and approximately 78 doses of Phenothiazine, among other things, as ordered by the Respondent. The record further indicates incomplete documentation of the patient's condition, no systematic evaluation and treatment of her medical problems, and the use of large quantities of Demerol and other drugs in treating symptoms rather than causes.

18. An expert medical witness reviewed the records concerning the case of Patient E and rendered his expert opinion as to Respondent's performance. He expressed concern over, among other things, Respondent's inadequate documentation of pertinent medical records, his apparent

overuse of narcotics such as Demerol and other drugs, and his inadequate therapy in the treatment of the patient. In his expert opinion, such conduct represented substandard care which was outside the range of acceptable medical treatment in similar situations. The Board agrees and so finds that Respondent's treatment in this case was below the standard of care expected of competent medical practitioners in similar situations in this State and that the allegations of the Complaint have been proven.

19. In the case of Patient F, a 54-year-old female patient of the Respondent, the record indicates that she was admitted to the Cherokee County Memorial Hospital on February 15, 1982, for back pain and an ingrown toenail. Respondent treated her complaints with, among other things, approximately 34 injections of Demerol, 49

doses of Zomax, 32 doses of Thorazine, and other drugs such as Vicodin, Flexoril, Valium. Respondent did not perform appropriate diagnostic tests or evaluate the cause of her complaints.

20. On March 8, 1982, the patient was re-admitted with cerebral concussion with loss of consciousness following an automobile accident. She complained of headache and chest pain, however, appropriate diagnostic tests were not performed by Respondent. Respondent treated the patient with, among other things, Zomax, Thorazine, Hydrocodone, Limbitrol, Navane, and approximately 42 injections of Nubain.

21. An expert medical witness reviewed the records concerning this case and rendered his expert opinion as to Respondent's performance. He expressed concern over, among other things, Respondent's inadequate documentation of perti-

nent medical records, his apparent overuse of narcotics such as Demerol and other drugs, and his inadequate therapy in the treatment of the patient. In his expert opinion, such conduct represented substandard care which was outside the range of acceptable medical treatment in similar situations. The Board agrees and so finds that Respondent's treatment in this case was below the standard of care expected of competent medical practitioners in similar situations in this State and that the allegations of the Complaint have been proven.

22. In the case of Patient G, a 52-year-old female patient of the Respondent, the record indicates that between February 15, 1981, and April 10, 1982, this patient was admitted to the Cherokee County Memorial Hospital on seven occasions, totalling 63 days for weakness, shortness of

breath, depression, nervousness, and chest pains. During that time, Respondent did not perform appropriate diagnostic tests or evaluate the cause of her complaints. Respondent treated this patient with approximately 120 injections of Demerol, plus doses of Zomax, and the routine administration of Valium or its equivalent during the patient's hospitalization.

23. An expert medical witness reviewed the records concerning this case and rendered his expert opinion as to Respondent's performance. He expressed concern over, among other things, Respondent's inadequate documentation of pertinent medical records, his apparent overuse of narcotics such as Demerol and other drugs, and his inadequate therapy in the treatment of the patient. In his expert opinion, such conduct represented substandard care which was outside the range of

acceptable medical treatment in similar situations. The Board agrees and so finds that Respondent's treatment in this case was below the standard of care expected of competent medical practitioners in similar situations in this State and that the allegations of the Complaint have been proven.

24. In the case of Patient H, an 18-year-old female patient of the Respondent, the record indicates this patient was hospitalized by the Respondent at the Cherokee County Memorial Hospital five times between June 25, 1981, and July 28, 1981, for reported heartburn and vomiting of blood. She was hospitalized for approximately 30 of the 33 days between the aforementioned dates, during which time no systematic investigation of her condition was performed. She was treated by Respondent with approximately 87 injections of

Demerol and was administered Librium and Thorazine, among other drugs.

25. On November 16, 1981, this patient was re-admitted to the Cherokee County Memorial Hospital for an overdose of Butisol which had been authorized by Respondent.

26. An expert medical witness reviewed the records concerning this case and rendered his expert opinion as to Respondent's performance. He expressed concern over, among other things, Respondent's inadequate documentation of pertinent medical records, his apparent overuse of narcotics such as Demerol and other drugs, and his inadequate therapy in the treatment of the patient. In his expert opinion, such conduct represented substandard care which was outside the range of acceptable medical treatment in similar situations. The Board agrees and so finds

that Respondent's treatment in this case was below the standard of care expected of competent medical practitioners in similar situations in this State and that the allegations of the Complaint have been proven.

27. In the case of Patient I, a 40-year-old female patient of the Respondent, the record indicates that this patient was admitted to the Cherokee County Memorial Hospital on March 13, 1981, for back pain. No systematic work-up of her medical problem was performed by Respondent prior to her discharge on March 31, 1981. During this hospitalization, Respondent treated her with approximately 81 injections of Demerol, 71 doses of Zomax, and various doses of Flexorial, Valium, and Endep.

28. Between August 6, 1981, and August 15, 1981, the Respondent re-admitted the patient for back pain and treated

her complaint with approximately 44 injections of Demerol, 29 doses of Zomax, and various doses of Valium and Flexoril, without performing appropriate diagnostic tests to determine the cause of her medical problem. Respondent thereafter continued to treat this patient with Demerol.

29. An expert medical witness reviewed the records concerning this case and rendered his expert opinion as to Respondent's performance. He expressed concern over, among other things, Respondent's inadequate documentation of pertinent medical records, he apparent overuse of narcotics such as Demerol and other drugs, and his inadequate therapy in the treatment of the patient. In his expert opinion, such conduct represented substandard care which was outside the range of acceptable medical treatment in similar situations. The Board agrees and so finds

that Respondent's treatment in this case was below the standard of care expected of competent medical practitioners in similar situations in this State and that the allegations of the Complaint have been proven.

30. In its review of all of the cases mentioned above, the Board has found a pattern of unethical and incompetent medical practice demonstrated by Respondent which has contributed to the death of some patients. Among other things, he has been shown to provide inadequate investigation of and attention to his patients' medical problems and failed to take appropriate measures expected of competent medical practitioners in this State. He has, furthermore, demonstrated a predilection toward overprescribing dangerous drugs, including controlled substances,

and using them inappropriately in contra-indicated situations.

CONCLUSIONS OF LAW

The Board concludes:

1. The Respondent has violated Section 40-47-200(7) and (12) of the 1976 Code of Laws of South Carolina, as amended, in that he has violated the following Principles of Ethics adopted by the Board.

A. Regulation 81-60 (A), in that his treatment of these patients does not reflect service to humanity with full respect for the dignity of man and does not merit the confidence of the patients entrusted to his care.

B. Regulation 81-60 (D), that Respondent is deficient in moral character or professional competency, and has failed to uphold the dignity and honor of the

profession and accept its self-imposed disciplines.

C. Regulation 81-60 (E), in that Respondent has neglected patients entrusted to his care.

D. Regulation 81-60 (G), in that Respondent has authorized drugs in a manner not in the best interest of his patients.

E. Regulation 82-60 (H), in that Respondent has failed to seek consultation in appropriate situations when the quality of medical service may have been enhanced thereby.

2. The Respondent has violated Section 40-47-200(8) of the 1976 Code of Laws of South Carolina, as amended, in that he has engaged in dishonorable, unethical, or unprofessional conduct likely to deceive, defraud, or harm the public.

3. The Respondent has violated Section 40-47-200(12) of the 1976 Code of Laws of South Carolina, as amended, in that he has been found to lack the ethical and professional competence to practice medicine.

THEREFORE, it is ordered that the Respondent's license to practice medicine in this State be revoked.

AND IT IS SO ORDERED.

"Misconduct" which constitutes grounds for revocation, suspension, or other restriction of a license or limitation on or other discipline of a licensee is a satisfactory showing to the board of any of the following:

(1) That the holder of a license has violated the principles of ethics as adopted by the State Board of Medical Examiners and published in its regulations.

(2) That the holder of a license is guilty of engaging in any dishonorable, unethical, or unprofessional conduct that is likely to deceive, defraud, or harm the public.

(3) That the holder of a license is guilty of violating the code of medical ethics adopted by the board in accordance with § 40-47-20 or has been found by the board to lack the ethical or professional

competence to practice medicine or osteopathy.

81-60. Principles of Medical Ethics.

A. The principal objective of the medical profession is to render service to humanity with full respect for the dignity of man. Physicians should merit the confidence of patients entrusted to their care, rendering to each a full measure of service and devotion.

B. Physicians should strive continually to improve medical knowledge and skill, and should make available to their patients and colleagues the benefits of their professional attainments.

C. A physician should practice a method of healing founded on a scientific basis; and he should not voluntarily associate professionally with anyone who violates this principle.

D. The medical profession should safeguard the public and itself against physicians deficient in moral character or

professional competence. Physicians should observe all laws, uphold the dignity and honor of the profession and accept its self-imposed disciplines. They should expose, without hesitation, illegal or unethical conduct of fellow members of the profession.

E. A physician may choose whom he will serve. In an emergency, however, he should render service to the best of his ability. Having undertaken the care of a patient, he may not neglect him; and unless he has been discharged he may discontinue his services only after giving adequate notice. He should not solicit patients.

E. A physician may choose whom he will serve. In an emergency, however, he should render service to the best of his ability. Having undertaken the care of a patient, he may not neglect him; and un-

less he has been discharged he may discontinue his services only after giving adequate notice. He should not solicit patients

F. A physician should not dispose of his services under terms or conditions which tend to interfere with or impair the free and complete exercise of his medical judgment and skill or tend to cause a deterioration of the quality of medical care.

G. In the practice of medicine a physician should limit the source of his professional income to medical services actually rendered by him, or under his supervision, to his patients. His fee should be commensurate with the services rendered and the patient's ability to pay. He should neither pay nor receive a commission for referral of patients. Drugs, remedies or appliances may be dispensed or

supplied by the physician provided it is in the best interests of the patient.

H. A physician should seek consultation upon request in doubtful or difficult cases or whenever it appears that the quality of medical service may be enhanced thereby.

I. A physician may not reveal the confidences entrusted to him in the course of medical attendance, or the deficiencies he may observe in the character of patients, unless he is required to do so by law or unless it becomes necessary in order to protect the welfare of the individual or of the community.

J. The honored ideals of the medical profession imply that the responsibilities of the physician extend not only to the individual, but also to society where these responsibilities deserve his interest and participation in activities which

have the purpose of improving both the health and the well-being of the individual and the community.

ANSWER

FOR A FIRST DEFENSE

The Respondent, Fasih Q. Zaman, answering the Complaint of the State Board of Medical Examiners, and specifically reserving all rights under any all Motions heretofore made or hereinafter to be made, and reserving any right now existing to object to the jurisdiction of this body in any fashion, does now show:

1. That each and every allegation of the Complaint not hereinafter admitted is specifically denied.

2. That the portion of paragraph I of the Complaint which alleges that the Respondent is a physician duly licensed by the State Board of medical Examiners of South Carolina is admitted; that the remaining portions of paragraph I are denied; that the Respondent resides in and

practices medicine in Rawalpindi, Pakistan.

3. That the Respondent admits that he has provided medical treatment to the persons listed in paragraph II of the Complaint; that the Respondent denies that the medical treatment that he provided the said patients is accurately described or characterized in the Complaint.

4. That the Respondent alleges that the medical treatment he provided the said patients was entirely appropriate and indicated and well within the parameters of accepted medical standards.

5. That the Respondent denies that he has violated Section 40-47-200 of the Code of Laws of South Carolina or any of its subsections, or that he has violated any of the Principles of Medical Ethics.

FOR A SECOND DEFENSE

6. That each and every allegation of the First Defense is incorporated herein as if re-stated verbatim.

7. That the allegations contained in paragraphs IIA through IIS are so vague, indefinite, uncertain, and/or overly broad that the Respondent is not adequately informed of the violations with which he his charged and thereby is unable to adequately prepare a defense thereto, so that the Complaint should be dismissed.

FOR A THIRD DEFENSE

8. That each and every allegation of the First Defense and Second Defense is incorporated herein as if re-stated verbatim.

9. That the statutes, regulations and principles which the Respondent is accused of violating are so vague, indefinite, uncertain, and/or overly broad that Respondent is not adequately informed of

the violations with which he is charged and is unable to prepare an adequate defense thereto, and as such the said statutes, regulations and principles are unconstitutional, so that the Complaint is invalid and should be dismissed.

FOR A FOURTH DEFENSE

10. That each and every allegation of the First Defense, Second Defense, and Third Defense is incorporated herein as if re-stated verbatim.

11. That the South Carolina State Board of Medical Examiners has heretofore initiated a proceeding against the Respondent herein alleging the identical violations as stated in the Complaint herein; that the South Carolina State Board of Medical Examiners is thereby estopped and barred by the Federal and State Constitutions from bringing the allegations again

against the Respondent, so that the Complaint should be dismissed.

FOR A FIFTH DEFENSE

12. That each and every allegation of the First Defense, Second Defense, Third Defense, and Fourth Defense is incorporated herein as if re-stated verbatim.

13. That the Respondent is informed and believes that the State Board of Medical Examiners has not brought the allegations made in the Complaint in a timely fashion; that all of the actions of which the State Board complains took place more than four years ago; that by reason of the passage of time the Respondent is unable to prepare an adequate defense to the allegations in the Complaint so that he is prejudiced, and that therefore the doctrine of laches operates to bar the South

Carolina State Board of Medical Examiners from bringing the within action.

FOR A SIXTH DEFENSE

14. That the allegations of the First, Second, Third, Fourth, and Fifth Defenses are incorporated herein as if re-stated verbatim.

15. That Respondent is informed and believes that the Rule referred to in the Complaint, No. 81-60, is null and void and of no effect as it would apply to the alleged facts in the Complaint herein, so that Respondent has violated no Rule of the Board and could not have violated any such Rule, so that the Complaint should be dismissed.

FOR A SEVENTH DEFENSE

16. That the allegations of the First, Second, Third, Fourth, Fifth, and Sixth Defenses are incorporated herein as if re-stated verbatim.

17. That Respondent is informed and believes that a person or persons unknown have brought accusations regarding him before the Board of Medical Examiners and that the Board refuses to make known the identity of his accuser to him, and that this violates the provisions of the Due Process clauses of the Federal and State Constitutions, so that these proceedings are unconstitutional and unauthorized and hence null and void so that the Complaint should be dismissed.

FOR AN EIGHTH DEFENSE

18. That the provisions of the First, Second, Third, Fourth, Fifth, Sixth, and Seventh Defenses are repeated here as though set forth at this place verbatim.

19. That the Respondent is informed and believes that the Board of Medical Examiners is bringing charges against him

and is sitting to determine the truth or falsity of its own charges and to impose sanctions against him of potentially great severity, all of which harms him substantially and denies him due process of law in violation of both the Constitution of the State of South Carolina and that of the United States of America, so that the proceedings are unconstitutional and the Complaint should be dismissed.

WHEREFORE, the Respondent having Answered the Complaint herein does respectfully pray that the same should be dismissed.

MOTION TO MAKE MORE DEFINITE

AND CERTAIN

COMES NOW RESPONDENT, by and through his attorneys, H. Fulton Ross, Jr. and Randall M. Chastain, reserving all rights under law to further move and Answer subject to this and any other Motions he has

made or might make in the future and waiving no right to object to the jurisdiction of this tribunal, and moves that the Complaint herein be made more definite and certain.

The grounds for this motion are the law of the United States, particularly but not exclusively the Due Process clause of the United States Constitution, the laws of the State of South Carolina, particularly but not exclusively the Due Process Clause of Article I Section 3 of the Constitution of the State of South Carolina, and the allegations of the Complaint.

The Complaint alleges in a conclusory manner that certain acts of the Respondent violate in nineteen (19) cases Sections 4-47-200 (7), (8), and (12) of the South Carolina Code, 1976, and Rule No. 81-60 of the Board of Medical Examiners. The Respondent cannot determine from the conclu-

sory language of the Complaint and the general language of the statute and regulations the manner in which his conduct is supposed to be violative of law, since the general allegations of the Code sections and the Rule do not inform him thereof.

ORDER (MOTION TO MAKE MORE DEFINITE AND CERTAIN)

This matter comes before the Board upon Respondent's Motion to Make More Definite and Certain regarding the Complaint filed against him dated January 16, 1986. A Hearing on this matter was held before the Board on October 14, 1986. The State was represented by Stephen S. Seeling, Assistant Attorney General. The Respondent did not appear but was represented by Randall M. Chastain, Esquire.

Respondent based his Motion on his argument that the Complaint did not give sufficient information and detail regarding the specific claims of misconduct that are alleged in the Complaint. Even a cursory review of the Complaint belies this contention. The Complaint contains patient names, specific dates of hospitalizations, names and dosage amounts of

allegedly improperly-ordered drugs, precisely-detailed allegations of misconduct and accounting of the specific statutes and regulations allegedly violated.

This Board finds no merit in the allegations advanced by the Respondent in support of his Motion to Make More Definite and Certain. For these reasons, it is hereby ORDERED that Respondent's Motion to Make More Definite and Certain be hereby DENIED.

AND IT IS SO ORDERED.

On or about January 16, 1986, the Executive Director of the State Board of Medical Examiners of South Carolina (the Board) filed and served a Notice and Complaint against Fasih Q. Zaman, M.D. (Respondent), who is a physician duly licensed by the Board to practice medicine in South Carolina. On or about December 9, 1987, after proper notice, a Hearing was held before a Panel of members of the Medical Disciplinary Commission pursuant to Section 40-47-200 and Regulations No. 81-15 and 81-16 of the 1976 Code of Laws of South Carolina, as amended. Following receipt of the Hearing Panel's Report, a Final Order hearing was noticed and scheduled for Monday, February 1, 1988, at the Town House Hotel, 1615 Gervais Street, Columbia, South Carolina. The Respondent did not appear, but he was represented by

Randall M. Chastain, Esquire. The State was represented by Richard P. Wilson, Assistant Attorney General.

At the scheduled Final Order Hearing on February 1, 1988, Respondent's counsel presented a Motion dated January 28, 1988, requesting that the Board cancel the Final Order Hearing and remand the matter to the Hearing Panel for the taking of additional testimony at such time as respondent "could conveniently be present (as he desires)." Attached to the Motion were copies of an airline ticket, two affidavits of Respondent, and a affidavit of Dr. Mohammad Aghar Qureshi, which were offered in support of his previously asserted oral motion for continuance.

This Board is certainly interested in affording Respondent an opportunity to be heard concerning the allegations of the Complaint. Therefore, this matter will be

continued until the next meeting of the Board on April 27, 1988.

Prior to the hearing on April 27, 1988, Respondent may:

(a) Submit affidavits to the Board on his behalf from "expert witnesses" setting forth a review of Dr. Zaman's care with respect to the patients named in the Complaint.

(b) Through affidavits, submit evidence to the Board relevant to his personal background and training.

At the hearing on April 27, 1988, Respondent may, if he desires, make a full statement to the Board with respect to the allegations made in the Formal Complaint. This statement need not be elicited through the traditional question and answer format between counsel and witness;

rather, the Respondent shall be permitted to present in uninterrupted narrative form his position with respect to these allegations. This narrative statement to the Board shall not exceed one and one-half (1½) hours in length.

THEREFORE, this matter shall be continued for further hearing before this Board on April 27, 1988. Respondent may submit, if he so desires, affidavits prior to the hearing for review by the Board in advance of his appearance on April 27, 1988.

AND IT IS SO ORDERED.

MOTION FOR RECONSIDERATION OF ORDER OF 2/19/88

COMES NOW RESPONDENT by and through his attorneys undersigned and moves before this Honorable Board that it reconsider its Order of 2/19/88 in the following regards, the material following constituting the grounds for this Motion.

(1) The Respondent had initially requested that the Board cancel the Final Order Hearing and remand the matter to the Hearing Panel for the taking of additional testimony at such time as Respondent could attend, his attendance at the prior Hearing Panel proceedings having been prevented due to illness.

(2) The Board, by its Order of 2/19/88 required that if Respondent wished ore information to be available during the decision-making process Respondent could

submit affidavits to the Board from "expert witnesses" [quotation marks in the Board's Order] setting forth a review of Dr. Zaman's care with respect to the patients named in the Complaint, and could further submit affidavits relevant to his personal background and training. The Board further specified that at the hearing scheduled for 27 April 1988 Respondent might "make a full statement to the Board with respect to the allegations made in the Formal Complaint. This statement need not be elicited through the traditional question and answer format between counsel and witness; rather, the Respondent shall be permitted to present in uninterrupted narrative form his position with respect to these allegations. This narrative statement to the Board shall not exceed one and one-half hours in length." [Emphasis supplied.]

(3) Respondent respectfully submits that the approach specified in the Order of 19 February 1988 still denies him due process of law as guaranteed by the State and Federal Constitutions, in that it denies to him the opportunity to cross-examine the witnesses against him in a meaningful fashion, so that the "narrative statement" discussed will be ineffective and will only serve to render eventual appeal from an adverse determination by the Board as a whole meaningless itself. This latter proposition is so because an appeal from the final decision of an administrative agency must under our law be sustained if it is supported by certain evidence; if it is determined that the uncrossexamined testimony of the witnesses before the Hearing Panel should justify disciplinary action as recommended by the Hearing Panel, any later narrative pro-

duced by the Respondent could and likely would be discounted by a reviewing Court as being self-serving declaration after the fact.

There is simply no substitute in due process terms for the truthfinding effect of cross-examination.

(4) The Board by its action in granting Respondent some relief has implicitly recognized that there is a problem with this proceeding as it stands. There is only one cure (saving all other objections to the propriety of the Board's proceeding at all under assertedly invalid Regulations and vague charges) for this particular problem: reconsideration at the Hearing Panel level as originally requested.

WHEREFORE, Respondent respectfully requests that the Board reconsider the relief granted an instead remand the mat-

ter to the hearing panel for full reconsideration.

ORAL ORDER ON REMAND

CHAIRMAN: If we can, let's consider this motion at this time, please.

(At 10:18 a.m. everyone except board members left hearing room and returned at 10:20 am.)

CHAIRMAN: THe board has denied this motion to sent this back. They feel like this has gotten to us, and we need to see a resolution on this matter, and we want to proceed with that.

MR. CHASTAIN: All right, sir. Mr. Ross instructed me that he felt that there was a chance that was too great to take that Dr. Zaman would waive his position with regard to the due process issue by making a statement pursuant to the Board's order, and therefore Dr. Zaman will not appear today, nor will Mr. Ross.

AFFIDAVITS

(ED. NOTE: THESE AFFIDAVITS ARE REPRODUCED AS RECEIVED FROM PAKISTAN, COMPLETE WITH SPELLING AND GRAMMATICAL ERRORS)

I, Fashih Q. Zaman, do solemnly swear and depose as follows:

that I bought a ticket with confirmed reservations on the second of December 1987.

that I was only informed of the hearing date in the late November 1987 even then I made arrangements as rapidly as possible for travel on the plan to be in Gaffney South Carolina by the 8th of December 1987 at the latest. Certified copies of the ticket is attached.

that I started to feel sick on 4th of December 1987. I was having chest pains and they progressively got worse and un-bearable. By the 5th of

December 1987 I was in constant pain with difficulty in moving around. At that stage I consulted a speacialist physician for this.

that on the 5th of December 1987 he diagnosed me as having Acute coronary Insufficiency and advised complete bedrest. This put all my travel plans in jeopardy. My physician strictly instructed me no to undertake travel of any kind. Under his instructions I had no choice but to cancell my plans to travel to Gaffney, South Carolina.

that on 6th December onward I tried to contact my attorney Mr. Fulton Ross but did not succede in contacting him untill the morning of the 8th of December 1987. This is not unusual as international telephone connections are not easy to get.

that a medical certificate is attached showing my medical condition at that time.

that my physician now thinks that I am much improved and may be able to undertake travel soon unless there are new devlopments.

that I would like an opportunity to put my case in the hearing doing this will certainly clear my name.

Dr. Fashi Q. Zaman.

Sworn this 7th day of January 1988

I, Dr. Mohammad Azhar Qureshi, do hereby solemnly swear and depose:

that I am the physician taking care of Dr. Fashih Q. Zaman during his recent illness.

that he first consulted me on 5th December 1987 with the complaints of chest pains for the past few days which had progressively gotten worse.

that at that time when I first saw him his general condition was of grave concern to me in view of his complaints and my complete examination of him.

that my initial diagnosis was that he was suffering from Ischemic Heart Disease and at that time he was having Acute Coronary Insufficianvy.

that I advised him complete bedrest besides other medications and treatment.

that I advised him strictly against any travel espacialy by air.

that his condition is much improved and stabalized and is mobile now. He may be able to undertake travel soon. Any travel prior to this date would have been at a great risk of his health and even life.

that his future activities would be determined by his physical progress and further tests that may be indicated taking into consideration his future course of this illness.

Dr. Mohammad Azhar Qureshi.
MBBS.MD., FRCP
(Edin)
Consulting Physician
Pakistan Institute of
Medical Science.
Islamabad: Pakistan.

SWORN before me on this
7th January 1988.

AFFIDAVIT OF DR. FASIH Q. ZAMAN, M.D.

PERSONALLY appeared before me. Fashih Q. Zaman, who first being duly sworn, deposes and says:

1. That I am the Respondent in a proceeding brought before the State Board of Medical Examiners of South Carolina;

2. That I am licensed to practice medicine in the State of South Carolina; that I have resided and practiced medicine only in the Country of Pakistan since June 1985;

3. That the allegation currently pending against me concern my treatment of nine (9) patients (other allegations having been heretofore dismissed); that because the statutes, rules, regulations and allegations are so vague, indefinite, uncertain, and/;or overly broad I am not adequately informed of the violations with which I am charged and I am unable to

prepare and adequate and meaningful defense thereto, as is more specifically set forth hereinbelow:

(a) Patient "K" (paragraph II (K) of the Complaint).

The Complaint states that this patient was hospitalized four times between early 1981 and March 1982 with diagnoses of flu, obesity, headache, and renal calculi and that the Respondent ordered "excessive amounts of analgesics". The Complaint fails to inform me as to which of this patients' hospitalizations they are referring, which prescriptions of analgesics are supposed to be excessive, what an appropriate amount of analgesics would have been, and on what standards this allegation is based, and how I am supposed to have violated those standards.

(b) Patient "M" (paragraph II (M) of the Complaint).

The Complaint states that the patient was admitted to the hospital on three occasions in 1981 and 1982 and that the Respondent prescribed "excessive doses of analgesics and tranquilizers"; the Complaint does not state which prescriptions are supposed to be excessive, what an appropriate amount of analgesics would have been, and on what standards this allegation is based, and how I am supposed to have violated those standards.

(c) Patient "A" (paragraph II (A) of the Complaint).

The Complaint states that this patient was hospitalized seven times in 1981 and 1982; the Complaint also states that the Respondent ordered "an inordinate amount of narcotics and psychotherapeutic" medicines; the Complaint does not state which medications were supposed to be "inordinate", during which hospitalization

nor does the Complaint state what an "ordinate" amount would have been, and on what standards this allegation is based, and how I am supposed to have violated those standards.

(d) Patient "R" (paragraph II (R) of the Complaint).

The Complaint states that this patient was hospitalized on five occasions for duodenal ulcer. The Complaint also states that the Respondent unnecessarily hospitalized this patient and prescribe narcotics and sedatives with no evidence of disease; the Complaint fails to state which of the hospitalizations were unnecessary, why they were unnecessary, and what the standards for necessary hospitalizations are; the Complaint also fails to specify what evidence of disease is necessary, what is the standard therefor, and how I supposedly violated this standard.

(e) Patient "S" (paragraph II (S) of the Complaint

The Complaint states that this patient was admitted to the hospital on 2 occasions in 1982; the Complaint also states that the Respondent prescribed inordinate amounts of narcotics and that narcotics were contraindicated; the Complaint failed to state which narcotics were supposedly "inordinate" and on the hospitalization; the Complaint fails to state which narcotics were supposedly contraindicated. The Complaint also fails to state what amount would have been "ordinate" and on what standards this allegation is based, and how I am supposed to have violated those standards.

(f) Patient "D" (paragraph II (D) of the Complaint

The complaint states that this patient was admitted to the hospital on

December 4, 1980; the Complaint also states the Respondent used "contraindicated" medications and inadequate therapy".

The Complaint fails to state what adequate therapy or medications would have been and on what standards this is based and how I am supposed to have violated those standards.

(g) Patient "L" (paragraph II (L) of the Complaint

The Complaint states that this patient was admitted to the hospital on two occasions in 1981; the Complaint also states some of the treatment that the patient received; the Complaint then states that the Respondent used contraindicated medication and "did not follow basic medical care".

The Complaint fails to state which medications were contraindicated and on what occasions; the Complaint does not

state the standards for indicated medication or basic medical care, what those standards are based upon, and how and when I supposedly violated those standards.

(h) Patient "O" (paragraph II (O) of the Complaint).

The Complaint states that this patient was hospitalized in March 1982. the Complaint essentially states a portion of what treatment this patient received and what treatment this patient did not receive.

The Complaint fails to state what the standard for appropriate treatment was in a case such as this, what that standard is based upon, and how I supposedly violated that standard.

(i) Patient "Q" (paragraph II (Q) of the Complaint).

The Complaint alleges that this patient was hospitalized on five occasions

during 1981 and 1982 and states some of the treatment that was given. The Complaint alleges that the Respondent prescribed "contraindicated drugs" and "excessive analgesics".

The Complaint fails to state what the standard for appropriate treatment was in a case such as this, what that standard is based upon, and how I supposedly violated that standard.

In summary, each allegation of the Complaint simply states what I supposedly did while treating the patient and states that in effect this treatment was "inappropriate" or "inordinate". The allegations do not state what the acceptable standards of treatment should have been, the basis for these standards, or how I supposedly violated these standards, nor are the allegations specific as to date of treatment. Therefore I cannot ascertain

with any degree of certainty what the alleged appropriate standards of care are supposed to be or how I supposedly violated those standards, and, therefore, I cannot prepare a meaningful defense to those allegations.

4. That I have requested, through my attorneys, that these allegations be made ore definite, certain and specific but these requests have been denied.

5. That I have also asked, through my attorneys, that I know the identity of the Complainants against me in order that I might confront them for purposes of showing bias and prejudice, as well as for other purposes for which I am entitled to confront them, but these requests have been denied.

Further Affiant saith not.

_____

Dr. Fasih Q. Zaman, M.D.

SWORN to before me this

7th day of Jan, 1988

_____(SEAL)

91-331

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

FASIH Q. ZAMAN, M.D.,

Petitioner,

vs.

SOUTH CAROLINA STATE BOARD OF MEDICAL EXAMINERS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF SOUTH CAROLINA

BRIEF IN OPPOSITION

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ATTORNEYS for the Respondent,
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Medical Examiners

QUESTIONS PRESENTED
(as restated by Respondent)

I. Whether a doctor with undisputed actual knowledge of the professional misconduct charges against him was denied due process by a Complaint which alleged his wrongful acts in great detail and charged that those acts constituted professional misconduct and a lack of professional competence?

II. Whether due process was denied by the Medical Board's denial of an eleventh-hour, unsupported, motion for continuance based in part on alleged illness by one with a history of becoming "ill" in connection with proceedings against him?

III. Whether the Medical Board correctly kept the name of the initial

complainant confidential when Petitioner offered no factual basis for his request for disclosure?

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STATEMENT OF FACTS

Petitioner Fasih Q. Zaman was a licensed South Carolina physician whose license was revoked by the South Carolina Board of Medical Examiners in 1988. Zaman has lived in Pakistan since 1985, and has not practiced medicine in South Carolina since then.

The proceedings against Zaman were initially brought in 1982. The charges of professional misconduct included instances where at least four of Zaman's patients died when, among other things, he failed to show up at the hospital for many hours after the patients were admitted on an emergency basis, or prescribed contraindicated medicines or heavy doses of narcotics to treat essentially physical ailments. For several of those who died, Zaman had issued "no code" orders (i.e., no heroic efforts or resuscita-

tion) without consulting either the patients or their families. The charges involved incompetent treatment of nineteen patients in all.

Although Zaman complains of lack of notice of the charges against him, he has failed to inform this Court, except perhaps in the most oblique manner, that the 1987 hearing under appeal was essentially a retrial of the same charges which were brought against him in 1982. The only reason for the retrial was that the Supreme Court of South Carolina in 1985, in a case unrelated to Zaman, declared the composition of the State Board of Medical Examiners invalid under the state constitution. Toussaint v. State Board of Medical Examiners, 285 S.C. 266, 329 S.E.2d 433 (1985). At both the first set of hearings which began in 1983, and in the retrial in 1987 the

charges pertained to occurrences between 1980 and 1982. No new charges were added in the second proceeding. But for the fortuitous (from Zaman's standpoint) circumstance of the State Medical Board's composition having been declared invalid under state law in the Toussaint case, the proceedings against Zaman would have concluded several years ago. 1/

A persistent feature of Zaman's conduct where disciplinary proceedings were concerned was his tendency to develop illness at about the time his case was due to be heard. This happened both in 1985, when he suddenly became too ill to be cross-examined by

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1/ Another proceeding involving Zaman did reach the Supreme Court of South Carolina. It did not involve his license to practice medicine, but instead involved the termination of his staff privileges at a county hospital. In re Zaman, 285 S.C. 345, 329 S.E.2d 436 (1985).

the Medical Board's attorney, and also in 1987, when he claimed to have developed "acute coronary insufficiency" several days prior to the hearing date. On the day of the 1987 hearing, Zaman's counsel moved for a continuance based on Zaman's claimed illness. Nothing was offered in support of the motion, and the Medical Board's hearing panel accordingly denied the request for continuance. (A month later, Zaman submitted an affidavit from his physician which indicated that Zaman had largely recovered within that relatively short time.)

The hearing proceeded without Zaman present, and his counsel remained present and participated to some degree in the proceedings but, fearing a waiver, declined to cross-examine the Board's witnesses. Zaman was later offered various alternative methods to

present his side of the case to the Board, but refused them all. The Medical Board ultimately concluded that Zaman's license to practice medicine should be revoked. The Board's decision was affirmed by both the Circuit Court, App. 10-23, and the Supreme Court of South Carolina, App. 1-10. The Circuit Court noted that the record contained "substantial, indeed overwhelming, evidence of [Zaman's] numerous acts of professional misconduct." App. 13.

REASONS FOR DENYING THE WRIT

1. The charges against Zaman were clearly stated in the disciplinary Complaint.

The Petition for Certiorari is notably devoid of quotations from, or specific reference to, the Complaint filed by the Board against Zaman in this case. A review of just one of the

nineteen charges, set forth verbatim below, reveals the high degree of specificity contained in the Complaint.

O. Case of Marie Ross

1. On March 27, 1982, Marie Ross, a 61 year-old female patient of the Respondent, entered the emergency room of the Cherokee County Memorial Hospital complaining of lower back pain; by telephone, the Respondent ordered routine laboratory work to be done and Demerol and Zomax to be administered but did not see the patient until the following day. On her admission, the patient had indications of decreased kidney function which condition steadily deteriorated; the Respondent, however, ordered no test to determine the cause of her deteriorating kidney function. The Respondent ordered anti-hypertensive medication for the patient and continued it for at least forty-eight (48) hours after the patient had become hypotensive; he ordered no vasopressor agent to be administered when she became hypotensive.

2. The Respondent treated the patient with a non-steroidal inflammatory (Naprosyn) in spite of her renal failure. On admission, the patient was anemic, according to the hemoglobin, which fell by March 30, 1982; but the Respondent did not check it thereafter. The Respondent ordered the insertion of a subclavian catheter but did not order a chest x-ray thereafter.

3. After noting steady deterioration in his progress notes on April 7, April 8 and April 9, 1982, the Respondent ordered that no resuscitation be attempted; and the patient expired on April 9, 1982.

4. As a result of the foregoing acts, the Respondent has violated Sections 40-47-200(7), (8) and (12), CODE OF LAWS OF SOUTH CAROLINA, 1976, as amended, and the Principles of Medical Ethics as set forth in Rule No. 81-60 of the Board in the following particulars:

   (a) During the entire course of treatment for this patient, the Respondent made

no attempt to identify the cause of his patient's deteriorating kidney function, e.g., no analysis of urinary sediment, no ultrasound of the kidneys, no blood cultures to rule out sepsis, no central venous pressure to establish intravascular volume, no investigation to rule out collagen vascular disease, and no urine chemistry;

(b) During the entire course of this treatment, the Respondent made no attempt to treat his patient's deteriorating kidney function;

(c) During the entire course of treatment, the Respondent made no attempt to avoid or discontinue contraindicated medication such as Zomax and Naprosyn;

(d) During the entire course of treatment, the Respondent made no attempt to consult

with a nephrologist, to use dialysis, or to transfer this patient to another facility;

(e) The Respondent made no attempt to reverse his patient's deteriorating condition but instead ordered no resuscitation with inadequate information;

(f) The Respondent did not evaluate or treat his patient's increasing anemia; and

(g) The Respondent failed to order a chest x-ray after the insertion of a subclavian catheter, a routine procedure, because of the possibility of pneumothorax or hemorrhage.

Tr. 12-14.

The above-quoted portion of the Complaint is typical, in its amount of detail, of the rest of the Complaint. Clearly, Zaman was given ample notice of the wrongdoing alleged.

None of the cases cited by Zaman are remotely close to the facts of this case. Instead, the often-quoted due process standard for a complaint in an administrative matter is that the complaint is adequate if "the one proceeded against be reasonably apprised of the issues in controversy, and any such notice is adequate in the absence of a showing that a party was misled." Cella v. U.S., 208 F.2d 783, 789 (7th Cir. 1953); L. G. Balfour Co. v. F.T.C., 442 F.2d 1 (7th Cir. 1971).

Not only were Zaman's misdeeds set forth in great detail, but also the requisite standards were adequately charged. The Supreme Court of South Carolina has followed the general rule elsewhere that a charge of professional incompetence is sufficiently definite to provide notice that a physician's conduct must conform to generally ac-

cepted standards of medical conduct. App. 5; Toussaint v. State Bd. of Medical Examiners, ___ S.C. ___, 400 S.E.2d 488 (1991); Chastek v. Anderson, 83 Ill.2d 502, 416 N.E.2d 247 (1981) and cases cited therein. From the record, it appears that Zaman had not the faintest idea of what medical competence might be; but that failing was his own, not the Board's.

2. Zaman was completely familiar with the charges in any event, because the case had already been fully tried on a prior occasion.

As a matter of practical reality, Zaman's entire claim of lack of notice and knowledge is a complete misrepresentation. As previously noted, the entire case presented against him in 1987 had been presented in earlier hearings which had concluded two years earlier. A rehearing was necessary only because

in another case involving another physician the composition of the 1985 Medical Board had been invalidated as a matter of state law. In the prior hearing, the Board's entire case was presented (except for the cross-examination of Zaman, who not for the last time claimed illness, at least for that part of the proceedings). Zaman's Petition for Certiorari fails to inform the Court of the prior proceedings.

In Lyng v. Payne, ___ U.S. ___ 106 S.Ct. 2333, 2341 (1986), this Court held that one who had actual notice of a matter "clearly [had] no standing" to raise due process and other issues concerning notice. See also, e.g., National Equipment Rental Co. v Szukent, 375 U.S. 311, 314-315 (1964); Franklin v. White, 803 F.2d 416 (8th Cir. 1986); Wiren v. Eide, 542 F.2d 757 (9th Cir. 1976). As a result, this

Court should reject any claim of lack of notice made by one who not only had the fullest actual knowledge imaginable, but also has failed to inform this Court of his prior knowledge.

3. No due process rights were implicated by the simple denial of a continuance.

In his second question, Zaman seeks to elevate a garden-variety continuance issue into a matter worthy of consideration on certiorari. Since such matters are normally within the discretion of the court (or administrative body) below, Ungar v. Sarafite, 376 U.S. 575 (1964), and since that discretion was reasonably exercised, this issue is manifestly without merit.

As the South Carolina Supreme Court held, "counsel moved at the panel hearing for a continuance without any evidence to support the need for one.

Based on the record, we hold there was no abuse of discretion in refusing a continuance and [Zaman] waived his right to cross-examination by failing to appear at the panel hearing." App. 9.

Clearly, the Medical Board did not abuse its discretion. Zaman had already on a previous occasion claimed to have developed a sudden illness which prevented him from attending the portion of the prior hearing where he was due to be cross-examined. His claimed illness in 1987 was just as sudden and also somewhat vague ("acute coronary insufficiency"). No supporting documentation or affidavit was presented with his oral request for continuance. While Zaman claims to have been "strictly instructed" not to travel by his physician on December 5, he did not contact his attorney until December 8

(the day before the hearing), a three-day lapse which strains credibility even taking into account the difficulty of telephoning from Pakistan. The Board was told only that Zaman was being hospitalized to undergo some tests for a possible heart problem. His physician's affidavit, dated a month later, averred that in less than thirty days, Zaman had progressed from a condition causing "grave concern" to one of mobility nearly sufficient to come to the United States.

In light of all of the above facts, the Board was faced with an unsupported claim made at the last minute by one who had previously claimed to develop a sudden illness coincident with a disciplinary hearing. There was no abuse of discretion in denying a continuance, and no issue

worthy of review by certiorari has been presented.

4. No constitutional issue is raised by the Medical Board's decision to maintain the confidentiality of the identity of the original complainant.

This case, as most professional disciplinary cases throughout the nation, began with a complaint filed by an individual. Sections 40-47-210 and 40-47-212, S.C. Code Ann., made such communications, including the complainant's identity, confidential, again following the general rule in professional disciplinary cases. Section 40-47-212 provides that disclosure of otherwise confidential information should be made if necessary to insure due process.

This Court has recognized in a somewhat different context that confidentiality is necessary and effective

in professional disciplinary cases. Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978). In a long line of cases including Roviaro v. U.S., 353 U.S. 53 (1957), this Court and others have held that the government may withhold the name of an informer unless disclosure is necessary to the preparation of an effective defense.

Zaman set forth no reason in the record below for abrogating the usual privilege. Thus, the Supreme Court of South Carolina, in addition to holding that this issue had not been timely raised and preserved, held that "the record provides no factual basis for raising this issue on appeal." App. at 10. This Petition likewise is devoid of factual support and presents no issue worthy of this Court's consideration.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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